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Fall 1970

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## Recommended Citation

Richard C. Ausness, *Libel Per Quod in Florida*, 23 U. Fla. L. Rev. 51 (1970).

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# LIBEL *PER QUOD* IN FLORIDA

RICHARD C. AUSNESS\*

## DEFAMATION

The purpose of this article is to trace the development of the rules of defamation with particular reference to extrinsic fact. A defamatory communication is one that tends to diminish the esteem, respect, good will, or confidence in which a person is held or to excite adverse, derogatory, or unpleasant feelings or opinions against him.<sup>1</sup> To be actionable under the modern law, however, the defendant's statement must be capable of a defamatory meaning<sup>2</sup> in the sense normally understood.<sup>3</sup>

Defamation consists of the separate torts of libel and slander. Historically, these torts evolved independently of each other, and as a result different rules have attached to each. Despite differences in origin, however, reference to extrinsic facts may be required to establish the defamatory nature of the statement for actions in either tort.

### *Reference to Extrinsic Facts in Libel*

A statement may be defamatory on its face or its defamatory meaning may be discoverable only by reference to extrinsic facts. For example, a false statement that a particular young woman gave birth to twins is innocent on its face. If she is unmarried, however, this fact, extrinsic to the statement, may render it defamatory by imputing immoral conduct to her.<sup>4</sup>

In common law pleading, the "inducement" portion of the complaint sets forth allegations of fact extrinsic to the published matter itself.<sup>5</sup> The inducement is intended to supply sufficient extrinsic facts to render a statement that is not defamatory on its face capable of a defamatory meaning. In the "innuendo" portion of the complaint the plaintiff must then explain and establish the defamatory sense of the communication with reference to these extrinsic facts.<sup>6</sup> If the remark is capable of several interpretations, the plaintiff must also set forth in the innuendo the defamatory meaning understood by the recipient, even if no extrinsic facts were pleaded in the inducement.<sup>7</sup> The court will construe the matter in its nondefamatory sense if the plaintiff fails to establish such a defamatory meaning.<sup>8</sup> A

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1. W. PROSSER, TORTS §106, at 756 (3d ed. 1964).

2. *Economopoulos v. A. C. Pollard Co.*, 218 Mass. 294, 105 N.E. 896 (1914).

3. *Budd v. J. Y. Gooch Co.*, 157 Fla. 716, 27 So. 2d 72 (1946).

4. See *Morrison v. Ritchie & Co.*, [1902] 4 Fraser Sess. Cas. 645, 39 Scot L. Rep. 432.

5. RESTATEMENT OF TORTS §563 (1938); Henn, *Libel-by-Extrinsic Fact*, 47 CORNELL L.Q. 14, 19 (1961).

6. See C. GATLEY, LIBEL AND SLANDER 449-50 (5th ed. 1960).

7. Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966).

8. *Lasky v. Kempton*, 285 App. Div. 1121, 140 N.Y.S.2d 526 (1st Dep't 1955); Henn, *supra* note 5, at 20-21.

communication, even though defamatory, need not expressly refer to the plaintiff so long as it can be established that the defamatory meaning had reference to him. This identification may be established by means of reference to extrinsic facts in the inducement and is referred to as "colloquium."<sup>9</sup> Colloquium should be distinguished from establishment of the defamatory nature of a statement by reference to extrinsic fact.

Defamation may be actionable of itself or it may be actionable only upon proof of special damages. The plaintiff must always allege special damages by specific proof; general damages are presumed and need not be specified.<sup>10</sup> In addition, special damages must be pecuniary in nature,<sup>11</sup> although nonpecuniary general damages may also be recovered if special damages are proved.<sup>12</sup> The failure of many American courts to distinguish between reference to extrinsic fact and the special damages rule has resulted in much confusion in the law of libel and slander.

### *Early Development of Libel*

During the Anglo-Saxon period in England, local courts punished insults and other defamatory statements as crimes.<sup>13</sup> Later, both the manorial and communal courts continued to treat insults and abusive language as criminal acts.<sup>14</sup> In addition, these courts sometimes entertained civil suits for damages when defamatory remarks addressed to third parties caused injury to the plaintiff's reputation.<sup>15</sup> Finally, the ecclesiastical courts assumed considerable authority over defamation.<sup>16</sup> However, the common law courts did not take cognizance of defamation during the Middle Ages unless it fell within the statutory offense of *scandalum magnatum*.<sup>17</sup> When the common law courts at last assumed civil jurisdiction over defamation<sup>18</sup> they treated

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9. *Gnapinsky v. Goldyn*, 23 N.J. 243, 128 A.2d 697 (1957); Yankwich, *Certainty in the Law of Defamation*, 1 U.C.L.A.L. REV. 163 (1954).

10. C. McCORMICK, DAMAGES 442 (1935); Henn, *supra* note 5, at 17.

11. W. PROSSER, TORTS §107, at 779 (3d ed. 1964).

12. *Crane v. Donovan*, 92 Conn. 236, 102 A. 640 (1917).

13. T. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 483 & n.1 (1956). Punishment was normally a fine, but under certain circumstances it also included loss of the tongue. III Edgar, 4 (c. 946-61); II Canute, 15 (c. 1027-1034).

14. Veeder, *The History of the Law of Defamation*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 446, 449-50 (1909).

15. T. PLUCKNETT, *supra* note 13, at 484.

16. *Id.*; Veeder, *supra* note 14, at 451; Holdsworth, *Defamation in the Sixteenth and Seventeenth Century*, 40 L.Q. REV. 302, 303 (1924). The Church punished insults called *contumelia* as crimes. In addition, since persons of evil repute were often tried as *diffamai* in ecclesiastical courts, the Church also punished defamatory remarks to third parties. The theory was that such persons might cause prosecution of innocent persons on the basis of evil repute arising from defamatory remarks.

17. 3 Edw. I (Westminster 1) c. 34 (1275); 2 Rich. II, Stat. 1 c. 5 (1378); 12 Rich. II c. 11 (1388); 1 & 2 Phil. & M., c. 3 (1554); 1 Eliz. c. 6 (1559). See also 3 BLACKSTONE, COMMENTARIES\* 123, which defines *scandalum magnatum* as scandal or slander of great men or nobles.

18. In the Year Books from the first year of the reign of Edward III (1327) to the

the tort, known as slander, as an action on the case.<sup>19</sup> In this fashion damage, rather than insult, became the basis for the action of slander.

During the Tudor Period the Court of Star Chamber, perhaps under the influence of the Roman concept of *libellus famosus*,<sup>20</sup> treated defamatory remarks concerning both officials and private persons as crimes.<sup>21</sup> The common law courts assumed jurisdiction over libel upon the restoration of the Stuarts in 1660. From that time forward, libel developed as both a crime and a tort. The restrictive rules pertaining to the common law action of slander were never applied, however, to libel. "Libel was new to the judges: once having admitted it as a tort, they dowered it with all the generous comprehensiveness that the dead jurisdiction had applied to the crime."<sup>22</sup> The emergence of libel as an independent tort was accompanied by an emphasis upon insult rather than monetary damage as the salient element of the cause of action.<sup>23</sup> Damage was presumed from the nature of the insult and thus it was unnecessary to plead and prove special damages as required in slander. This distinction between an act that was wrongful in itself and one that was wrongful only if it caused damage was recognized by the courts as early as 1700.<sup>24</sup>

During the seventeenth century libel and slander existed side by side, and different rules were applied to essentially the same subject matter. Originally, spoken words and writings were both actionable as either libel or slander at common law.<sup>25</sup> Thereafter, libel became exclusively associated with written publications while slander was limited to oral communications.<sup>26</sup> The concept of special damages, however, was confined to slander while all forms of libel were actionable without proof of special damages regardless of whether reference to extrinsic facts was necessary to establish the defamatory nature of the statement.<sup>27</sup> The rules of libel and slander that reflected their criminal and civil origins respectively, came to be applied according to mode of publication, a factor that was irrelevant to the interests protected by each tort. In the nineteenth century this situation was criticized in *Thorley v. Lord Kerry*,<sup>28</sup> but the court refused to overturn the existing law because it had become firmly established. In England, all libel is still actionable without proof of special damage.<sup>29</sup> This position was accepted

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last year of the reign of Henry VIII (1547) there are only ten cases of defamation. Veeder, *supra* note 14, at 457.

19. *Id.*

20. De Libellis Famosis, 5 Co. Rep. 125A (1606); Veeder, *supra* note 14, at 464-59. BLACK'S LAW DICTIONARY 1062 (rev. 4th ed. 1968) states this is a civil law term defined as a publication injuriously affecting character.

21. T. PLUCKNETT, *supra* note 13, at 488; Holdsworth, *supra* note 16, at 305.

22. Carr, *The English Law of Defamation*, 18 L.Q. REV. 225, 388 (1902).

23. Holdsworth, *supra* note 16, at 304.

24. Iveson v. Moore, 1 Ld. Raym. 486, 490, 91 Eng. Rep. 1224 (1700).

25. T. PLUCKNETT, *supra* note 13, at 490. Veeder, *supra* note 14, at 453.

26. See *King v. Lake*, 145 Eng. Rep. 552 (1670).

27. See *Eldredge*, *supra* note 7, at 737.

28. 4 Taunt. 335, 128 Eng. Rep. 367 (1812).

29. *Hough v. London Express Newspaper, Ltd.*, [1940] 2 K.B. 507; *Cassidy v. Daily*

initially by the American courts and was adopted by the first *Restatement of Torts*.<sup>30</sup>

### *Development of Slander Per Se: The Special Damages Rule*

During the Middle Ages slander was ordinarily considered a spiritual matter within the jurisdiction of the ecclesiastical courts.<sup>31</sup> Gradually, the common law courts began to assume cognizance of defamatory statements that imputed to the plaintiff a crime punishable at common law.<sup>32</sup> In the seventeenth century, reflections on fitness for office,<sup>33</sup> skill in trade or profession,<sup>34</sup> and imputation of certain diseases such as leprosy<sup>35</sup> and syphilis<sup>36</sup> were also made actionable at common law.<sup>37</sup> In the nineteenth century a cause of action in slander was recognized by statute for imputations of unchastity against women.<sup>38</sup> These categories became known as "slander per se."

The concept of special damages also evolved during the seventeenth century. The rule first appeared in *Davis v. Gardiner*<sup>39</sup> where, although the defendant's remark imputed no common law offense, the court permitted the plaintiff to recover special damages for loss of marriage resulting from the defendant's false accusations. This new rule deprived the church courts of much of their remaining jurisdiction. Slander was actionable per se if it fell within one of the classes mentioned above, and actionable *per quod* if it did not fall within such classes but special damages of a temporal nature could be proved.<sup>40</sup>

Both the concept of slander per se and the special damages rule have been adopted by most American jurisdictions.<sup>41</sup> Under the modern law of slander, reference to extrinsic facts normally may be made to show that a statement not defamatory on its face carries a defamatory imputation that would place it within one of the four categories of slander per se.<sup>42</sup>

### *The Development of Libel Per Quod in America*

The term "per se" originally meant actionable without proof of special

Mirror Newspapers, Ltd., [1929] 2 K.B. 331.

30. RESTATEMENT OF TORTS §559 (1938).

31. T. PLUCKNETT, *supra* note 13, at 484.

32. The first case of this sort appears to have been Abbot of St. Albans Case, Y.B. 22 Edw. IV 20 (1482).

33. Terry v. Hooper, 1 Lev. 115, 83 Eng. Rep. 325 (1663).

34. Harman v. Delany, 2 Strange 898, 93 Eng. Rep. 925 (1731); Doctor Sibthorp's Case, 82 Eng. Rep. 192 (1636).

35. Taylor v. Perkins, 79 Eng. Rep. 126 (1607).

36. Crittal v. Horner, 80 Eng. Rep. 366 (1619).

37. Holdsworth, *supra* note 16, at 308; Veeder, *supra* note 14, at 458.

38. Slander of Women Act, 54 & 55 Vict., c. 51 (1891).

39. 79 Eng. Rep. 1155 (1593).

40. T. PLUCKNETT, *supra* note 13, at 494; Veeder, *supra* note 14, at 458-59.

41. See generally W. PROSSER, TORTS §107 (3d ed. 1964).

42. Eldredge, *supra* note 7, at 736.

damages.<sup>43</sup> This terminology was properly applied to slander since some, but not all, forms of slander were actionable without proof of special damages. The term was unnecessary in libel at common law, however, since every libel was actionable without proof of special damages.<sup>44</sup> Nevertheless, a few American courts employed the term "libel per se" to describe a written publication that was defamatory on its face without reference to extrinsic facts.<sup>45</sup> The use of this terminology induced some courts<sup>46</sup> to declare erroneously that a communication that was not defamatory on its face was not libel per se and hence not actionable without proof of special damages.<sup>47</sup>

According to Dean Prosser the distinction between libel per se and libel *per quod* is presently made in at least twenty-four states and may have been adopted in another nine.<sup>48</sup> Under the modern rule, if a written statement is defamatory on its face, it is actionable without proof of special damages.<sup>49</sup> When extrinsic facts are necessary to establish the defamatory meaning, however, the statement is actionable *per quod* and must be treated as slander.<sup>50</sup> If the imputation falls into one of the four categories of slander per se it is actionable without proof of special damages;<sup>51</sup> otherwise, special damages must be proved.<sup>52</sup>

#### LIBEL *Per Quod* IN FLORIDA

Although there is much dicta on the subject, very few cases of libel-by-extrinsic fact have actually arisen in Florida. The first such case was *Montgomery v. Knox*<sup>53</sup> where the defendant, an insurance company official, declared that the plaintiff had set fire to his own property, thus implying that the plaintiff had committed arson in order to collect the fire insurance. The Florida supreme court held that, while the communication was not defamatory on its face, the plaintiff had pleaded extrinsic facts by way of colloquium and innuendo, and the complaint thus stated a cause of action. The court also stated that any published language that tends to degrade a person, bring him into ill repute, destroy his neighbors' confidence in his integrity, or cause other like injury is actionable irrespective of special damages.<sup>54</sup> Although the court ultimately decided for the defendant on other

43. Note, *Libel Per Se and Special Damages*, 13 VAND. L. REV. 730 (1960).

44. Eldredge, *supra* note 7, at 737; Henn, *supra* note 5, at 22-23.

45. Note, *supra* note 43, at 734.

46. Geisler v. Brown, 6 Neb. 254 (1877).

47. Note, *supra* note 42, at 730.

48. W. PROSSER, *Libel Per Quod*, 46 VA. L. REV. 839, 844-46 (1960). But see Eldredge, note 7 *supra*; Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966).

49. Iltitzky v. Goodman, 57 Ariz. 216, 112 P.2d 860 (1941).

50. W. PROSSER, TORTS 782, §107 (3d ed. 1964).

51. Caldwell v. Crowell- Collier Publishing Co., 161 F.2d 233 (5th Cir. 1947); Donnelly, *The Law of Defamation: Proposals for Reform*, 33 MINN. L. REV. 609, 610 (1949).

52. W. PROSSER, TORTS 782, §107 (3d ed. 1964).

53. 23 Fla. 595, 3 So. 211 (1887).

54. *Id.* at 599, 3 So. at 218.

grounds, it regarded the English rule of libel, which was the majority rule in America at the time, as the better position.

In *Briggs v. Brown*<sup>55</sup> the plaintiff was secretary and treasurer of an investment company. The defendant, his successor in office, wrote a letter to the holder of the plaintiff's surety bond accusing the plaintiff of dishonesty and incompetence. The Florida supreme court held that an action for libel would lie for any false and unprivileged publication that "exposes a person to distrust, hatred, contempt, ridicule or obloquy, or which causes such person to be avoided or which has a tendency to injure such a person in his office, occupation, business, or employment." This statement has become the accepted definition of defamation in Florida.<sup>56</sup> Furthermore, the court declared that if the natural and proximate consequence of a publication necessarily caused injury to a person in his personal, social, official, or business relations, injury and wrong would be presumed or implied and such publication would be actionable *per se*.<sup>57</sup> Moreover, the court stated: "[I]f the publication is not privileged and is not actionable *per se* because the publication as ordinarily understood will not naturally and necessarily cause injury, damages may be recovered upon proper allegations and proofs for such special injury as is natural and proximate, though not a necessary consequence of the wrongful publication."<sup>58</sup> No Florida authority was cited for this proposition, which indeed was contrary to the dictum of the court in *Montgomery*.

The court had apparently reasoned that injury to a plaintiff's reputation must be a "natural and proximate" consequence of the defendant's publication in order for the law to presume injury. Since a statement that is not defamatory on its face might not "naturally and proximately" cause injury, the plaintiff should therefore demonstrate injury by allegation and proof of special damages. This approach ignored the common law alternative that the plaintiff be required to plead extrinsic facts in the inducement sufficient to establish a defamatory meaning from which damage would be implied as a natural and proximate consequence. In *Briggs*, however, instead of pleading one set of facts as innuendo from which the court could determine if injury is a natural and proximate consequence, the plaintiff was required to establish another set of facts, namely, the injury itself in the form of special damages! Thus, the special damages rule of slander was introduced in Florida under the guise of libel *per quod*. The case itself was actually decided on another issue. The court determined that the plaintiff had properly alleged special damages and therefore stated a cause of action; the communication, however, was held to be privileged and judgment was given for the defendant. It may be argued, therefore, that the court's statement concerning libel *per quod* could be regarded as dictum.

In 1933 the Florida supreme court in *Layne v. Tribune Co.*<sup>59</sup> reiterated

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55. 55 Fla. 417, 46 So. 325 (1908).

56. *Id.* at 430, 46 So. at 230.

57. *Id.*

58. *Id.*

59. 108 Fla. 177, 146 So. 234 (1933).

the rule of libel *per quod* first enunciated in *Briggs*. The defendant in *Layne* published a statement obtained from a wire service that the plaintiff, a Congressman's secretary, had been indicted for illegal possession of liquor. After quoting the definition of libel *per se* from *Briggs*, the court conceded that it was ordinarily libel *per se* to falsely accuse a plaintiff of a criminal offense involving an element of disgrace or moral turpitude. Nevertheless, the court stated:<sup>60</sup>

Innuendoes in the pleadings are, however, ineffective for the purpose of fixing the character of an alleged libelous publication as being libelous *per se*. In determining whether or not a publication is libelous *per se*, the language of the publication itself can alone be looked to, without the aid of innuendoes, since the innuendo in libel cases is but the deduction of the pleader from the words used in the publication. Unless the pleader's deduction is supported by the *language of the publication*, the actionable quality of the publication is not legally disclosed.

The court did not specifically mention whether extrinsic facts could be pleaded in the inducement from which an innuendo could be drawn. If the court meant that no publication could be libel *per se* unless defamatory on its face, without reference to extrinsic facts, it was making a significant change in the existing law of libel in Florida. Some jurisdictions had adopted the rule that, if an innuendo is required, there is no libel *per se*, by extrinsic fact or otherwise.<sup>61</sup> Florida had not, however, adopted this rule. In slander, reference to extrinsic facts had always been permissible to establish slander *per se* if the defamation imputed a crime to the plaintiff. To disallow this in libel would have made the law of libel more restrictive in this respect than that of slander!<sup>62</sup> The court did not cite any Florida authority for this position. In the Alabama case cited,<sup>63</sup> involving a charge of incompetency in office, no extrinsic facts were pleaded and the court held the statement was libelous *per se*. The Alabama court's references to innuendo<sup>64</sup> apparently did not involve an issue of extrinsic evidence. It is possible therefore that the Florida court's discussion of innuendo, which was a paraphrase of the Alabama court's opinion, likewise had no application to the problem of extrinsic facts. A slander case the following year,<sup>65</sup> however, suggested that Florida would not permit reference to extrinsic facts to establish the defamatory nature of a statement, even when the innuendo fell into one of the four categories of slander *per se*. In fact the court failed even to mention the four categories of slander *per se*.<sup>66</sup>

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60. *Id.* at 182-83, 146 So. at 237 (emphasis added).

61. Henn, *Libel-by-Extrinsic Fact*, 47 CORNELL L.Q. 14, 23 (1961). The innuendo test has been characterized as a throwback to the slander doctrine of *mitior sensus*, or most favorable acceptance. See Note, *supra* note 43, at 735, 743.

62. See Henn, *supra* note 61, at 48.

63. *Wofford v. Meeks*, 129 Ala. 349, 30 So. 625 (1901).

64. *Id.* at 350, 30 So. at 627.

65. *Commander v. Pedersen*, 116 Fla. 148, 156 So. 337 (1934).

66. The court retreated from this position in *Campbell v. Jacksonville Kennel Club*, 66



The remainder of *Layne* concerned whether the defendant newspaper could be responsible for publishing in good faith the content of an item from its wire service. The court held for the defendant and stated that where an action for libel was based upon publication of a false news dispatch not written by the defendant, the plaintiff must demonstrate wantonness, recklessness, or carelessness in its publication, or the action will be treated as libel *per quod*.<sup>67</sup>

For the next several years the Florida court continued to equate libel *per quod* with the requirement of special damages outside the context of reference to extrinsic fact.<sup>68</sup> The rule of libel *per quod* in *Layne* was repeated in *Budd v. J. Y. Gooch Company*<sup>69</sup> where the imputation was that the plaintiff was a common law wife. The court again stated that innuendoes were ineffective for the purpose of fixing the character of a publication as libelous *per se*.<sup>70</sup> The opinion declared that since common law marriage was recognized as valid in Florida, the statement was not defamatory at all. The court did not consider the fact that the defamatory statement may have charged a crime or imputed unchastity to a woman, two of the slander *per se* categories.

In 1947 a federal court, interpreting Florida law in *Caldwell v. Crowell-Collier Publishing Company*,<sup>71</sup> held that a magazine article charging that the Governor of Florida condoned lynchings was defamatory on its face without reference to extrinsic facts. Nevertheless, the court referred to the fact that the defendant's statement reflected on the plaintiff's fitness in office. Evidence in the form of a letter from the plaintiff was used to determine the falseness of the defendant's statement and to prove the existence of actual malice sufficient to defeat a qualified privilege of fair comment. It did not appear, however, that reference to extrinsic facts was necessary to establish the defamation itself. Indeed, the court declared: "[A] jury might well conclude that the Governor was being held up as unfaithful to his office by reason of facts falsely stated and implied in the editorial."<sup>72</sup>

Applying Florida law in another case,<sup>73</sup> the same court held that an accusation that plaintiff's news service was controlled by gangsters, which required extrinsic facts to establish colloquium and innuendo, was libel *per quod* and required proof of special damages. The court stated: "[P]laintiff must rely, and does rely, upon extrinsic facts to establish the alleged libel; therefore, the language complained of is not libelous *per se*, and special damages must be, but have not been, alleged."<sup>74</sup> This approach was

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So. 2d 495 (Fla. 1953). See text accompanying notes 78-80 *infra*.

67. *Layne v. Tribune Co.*, 108 Fla. 177, 190, 146 So. 234, 239 (1933).

68. *Johnson v. Finance Acceptance Co.*, 118 Fla. 397, 159 So. 364 (1935); *Harriss v. Metropolis Co.*, 118 Fla. 825, 160 So. 205 (1935).

69. 157 Fla. 716, 27 So. 2d 72 (1946).

70. *Id.* at 719, 27 So. 2d at 74-75.

71. 161 F.2d 333 (5th Cir. 1947), *remanded for retrial, appealed*, 170 F.2d 941 (5th Cir. 1948).

72. *Caldwell v. Crowell-Collier Publishing Co.*, 161 F.2d 333, 336 (5th Cir. 1947).

73. *McBride v. Crowell-Collier Publishing Co.*, 196 F.2d 187 (5th Cir. (1952).

74. *Id.* at 189.

followed despite the fact that the imputation clearly reflected upon the plaintiff's trade, profession, or office. A more tenable rationale for the decision is that defendant's statement was directed against the plaintiff's business operation, a corporate entity, rather than against the plaintiff himself, and therefore, the case might be regarded as one of "injurious falsehood"<sup>75</sup> rather than libel.

Several years later some aspects of the libel *per quod* problem in Florida were clarified. In *Richard v. Gray*<sup>76</sup> the defendant radio station had asserted that the plaintiff, a Miami city councilman, accepted an offer of a bribe of 200,000 dollars to allow illegal "punch boards" to operate. In holding that a radio broadcast was libel rather than slander, the court stated:<sup>77</sup>

The decisions in this jurisdiction as well as others, clearly establish that a publication is libelous per se, or actionable per se, if, when considered alone without innuendo: (1) it charges that a person has committed an infamous crime, (2) it charges a person with having an infectious disease, (3) it tends to subject one to hatred, distrust, ridicule, contempt, or disgrace, or (4) it tends to injure one in his trade or profession.

Item (1), (2), and (4) were also categories of slander per se. The reference to innuendo, however, did not clearly indicate whether extrinsic facts might be pleaded in the inducement if they concerned matters in the above categories.

During the same year in *Campbell v. Jacksonville Kennel Club*,<sup>78</sup> the Florida supreme court specifically indicated that reference to extrinsic fact was permissible in slander per se:<sup>79</sup>

If, then the effect of the decision of this court in *Commander v. Pedersen* . . . is as contended by appellee — that is, that "words that are not on their face defamatory per se cannot be aided by innuendoes and extrinsic facts and circumstances, so as to make them defamatory or slanderous per se" — then we hereby recede from that portion of our opinion in *Commander v. Pedersen* . . . and we hold that even though the full impact of the alleged defamatory communication must be shown by allegations of inducement, colloquium and innuendo, it is nonetheless actionable per se, without the necessity of showing special damages, if the defamation falls within any of the classifications above noted.

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75. W. PROSSER, TORTS 938-95, §§ 122-24 (3d ed. 1964).

76. 62 So. 2d 597 (Fla. 1953).

77. *Id.* at 598.

78. 66 So. 2d 495 (Fla. 1953).

79. *Id.* at 498.

The classifications mentioned were the four traditional classes of slander per se: (1) criminal offense; (2) communicable disease; (3) reflection on trade, profession, or office; and (4) unchastity in a woman.<sup>80</sup> It is, of course, uncertain to what extent the language of *Campbell* would be applicable to the law of libel. It seems likely that the rule in *Campbell* will be applied to libel as well as to slander, since its application would bring Florida closer to the classical rule of libel *per quod*.

### *The Fifth Category of Slander Per Se in Florida*

The four traditional classes of slander per se were recognized in America by the early part of the twentieth century. However, Florida developed its own peculiar rule in this respect.

In *Sharp v. Bussey*<sup>81</sup> the defendant had stated that the plaintiff, a white man "ran around dance halls with Negro women."<sup>82</sup> The Florida supreme court held that such an oral publication was slander per se although it did not fall within one of the four recognized classes. The court, in support of this decision, declared: "[W]here a publication is false and not privileged and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official or business relations of life, wrong and injury are presumed or implied and such publication is actionable per se."<sup>83</sup> This statement was quoted from *Briggs v. Brown*,<sup>84</sup> a libel case that had already caused more than its share of difficulty in the law of libel. The court in *Sharp* thus apparently introduced a fifth category of slander per se, without requiring any reference to extrinsic fact.

Moreover, in *Joopenenko v. Gavagan*<sup>85</sup> the court held that an accusation that the plaintiff was a Communist constituted slander per se. The court noted that a criminal statute was involved,<sup>86</sup> but also discussed *Sharp v. Bussey* without clearly indicating the basis for its decision. In 1961, however, a Florida district court of appeal expressly referred to the fifth category of slander per se<sup>87</sup> in a case in which the defendant stated that the plaintiff was a "deadbeat and not an honest person."<sup>88</sup> The court held that the statement was slanderous per se. The complaint was found to be sufficient without allegation of special damages or allegation concerning plaintiff's trade or business since it alleged that plaintiff had been damaged in her personal, social, official and business relations. The court explicitly stated

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80. *Id.* at 497.

81. 137 Fla. 96, 187 So. 779 (1939).

82. *Id.* at 98, 187 So. at 779.

83. *Id.* at 100, 187 So. at 789, citing *Briggs v. Brown*, 55 Fla. 415, 430, 46 So. 325, 330 (1908).

84. 55 Fla. 417, 46 So. 325, 330 (1908).

85. 67 So. 2d 434 (Fla. 1953).

86. *Id.* at 437-38.

87. *Carter v. Sterling Fin. Co.*, 132 So. 2d 430 (1st D.C.A. Fla. 1961).

88. *Id.* at 431.

that the Florida supreme court had laid down an additional basis for slander per se in *Sharp v. Bussey*.<sup>89</sup>

As a result of the foregoing, there arose a question concerning the relationship of the fifth category of slander per se to the use of extrinsic facts in alleging defamation. In *Commander v. Pedersen*<sup>90</sup> the Florida supreme court stated that if it was necessary to allege and prove extrinsic facts and innuendoes, the alleged slanderous statements were not actionable per se, but were slanders actionable *per quod*. To recover in a suit for damages for slander *per quod*, it was necessary to allege and prove special damages.<sup>91</sup> There was no mention as such in *Commander* of the four categories of slander per se. The defendant's statement, however, alleged that the plaintiff, general manager of the Florida Citrus Exchange, had speculated in fruit and that he was a "crook." Since this charge, if true, would have resulted in plaintiff's removal from office, it would no doubt have qualified as a defamatory reflection on his trade, profession, or office.

Almost twenty years later, in *Campbell v. Jacksonville Kennel Club*,<sup>92</sup> the Florida supreme court returned to the traditional rule that extrinsic facts may be used to establish slander per se if the defamatory remark falls within one of the four categories. No mention was made of the fifth category. Therefore, if extrinsic fact is required to establish the fifth category, the action presumably will be treated as slander *per quod* and special damages must be alleged. Clearly, if the statement is defamatory on its face, it is slander per se, even though it falls within the fifth category.

### *Florida Law in Recent Cases*

At the present time, it appears that the laws of libel and slander in Florida are exactly the same with regard to the use of extrinsic facts. If the statement is defamatory on its face, it is actionable per se, that is, without proof of special damage. If reference to extrinsic fact must be made, the statement is still actionable per se if the statement concerns: (1) crime; (2) contagious disease; (3) trade, profession, or office; or (4) unchastity in a woman. If reference to extrinsic fact is required and the defamatory imputation does not fall within one of the above four categories, the statement is actionable *per quod* and special damages must be pleaded and proved.

Recent cases, however, have again somewhat obscured the Florida position. The opinion in a federal case<sup>93</sup> stated in dictum that, where words are capable of two meanings and the defamatory character of the communication depends upon extrinsic circumstances, the words are actionable *per quod* and special damages must be pleaded. In another case<sup>94</sup> the

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89. *Id.*

90. 116 Fla. 148, 156 So. 337 (1934).

91. *Id.* at 156, 156 So. at 340.

92. 66 So. 2d 495 (Fla. 1953).

93. *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377 (5th Cir. 1967).

94. *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967).

United States Court of Appeals, Fifth Circuit, stated that libel *per quod* occurs in Florida where the defamatory meaning or innuendo is not apparent on the face of the publication but must be established by proof of extrinsic facts.

A recent Florida case<sup>95</sup> properly held that an allegorical tale was libel *per se*, although colloquium could only be established by reference to extrinsic facts. However, another court<sup>96</sup> held that, where the libelous nature of a statement could be derived only by examination of the complaint for innuendo, the action was libel *per quod* and special damages had to be pleaded. The defamatory statement reflected upon the plaintiff's competence as a political officeholder and *Commander* was cited as authority. It is not clear whether reference to extrinsic fact was involved. These recent decisions indicate that the law in Florida is probably still unsettled.

#### SUGGESTIONS FOR REFORM IN THE LAW OF DEFAMATION

The illogical association of libel by extrinsic fact and the special damages rule of slander is in large part the result of a peculiar set of historical circumstances. The present system of libel and slander has been almost universally condemned by textwriters.<sup>97</sup> The extrinsic fact problem is a complicated one and proposals for reform must actually consider a number of interrelated problems, including defamation by extrinsic fact, the special damages rule, unification of libel and slander, and the basis of liability in libel and slander. Furthermore, proposals for reform must address themselves to the question of whether insult or damage is to be the gravamen of the offense. This is a policy matter that is principally within the purview of the legislature.

Ignoring for the moment the artificial standard of mode of publication as the distinction between libel and slander, the easiest solution to the problem of libel by extrinsic fact undoubtedly would be to revert to the traditional rule illustrated by *Montgomery v. Knox*.<sup>98</sup> One writer has objected to this approach in this period of mass communication as possibly being too harsh on a publisher who neither knows, nor has reason to know, of the existence of extrinsic facts that impart a defamatory meaning to an otherwise innocent statement.<sup>99</sup> Indeed, the rule of libel *per quod* has been defended on the theory that it affords a compromise between too liberal and too restrictive applications of liability, particularly with respect to defamatory statements by newspapers. However, the proper response to this situation is not imposition of the irrational special damages rule of libel *per quod*, but rather a modification of the liability without fault doctrine in the law of defamation. Indeed, to some extent this step has already been

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95. *Harwood v. Bush*, 223 So. 2d 359 (4th D.C.A. Fla. 1969).

96. *Piver v. Hoberman*, 220 So. 2d 408 (3d D.C.A. Fla. 1969).

97. W. PROSSER, *TORTS* 783, §107 (3d ed. 1964).

98. 23 Fla. 595, 3 So. 211 (1887); see text accompanying note 53 *supra*. See also *Henn*, *supra* note 61 at 46.

99. *Henn*, *supra* note 61, at 46-47.

taken in Florida. One statute restricts recovery to actual damages for publication of defamatory articles by a newspaper if an apology and retraction are issued upon demand.<sup>100</sup> Another statute permits liability for operators of radio and television stations for defamatory statements by individuals other than station employees only upon proof that the operator or employee was negligent in failing to prevent the broadcast.<sup>101</sup> Both of these laws provide some limitation of liability without any reference to the rule of defamation *per quod*. These statutes might also be extended to other media of mass communication if further limitation of liability for the mass media seems desirable.

Despite differences in origin, libel and slander probably should be treated as one. It can be seen, for example, that historical distinctions between libel and slander are illogical when applied to new forms of communication such as radio, cinema, and television. A number of arbitrary rules, which have sprung up concerning these new means of communication, could be eliminated by a merger of the two torts.<sup>102</sup>

One possibility for change would be to discard them both and create a new tort called "defamation." This approach has been followed in the Canadian Defamation Act.<sup>103</sup> If new legal rules must be developed to suit the peculiar character of an existing or future means of communication, they should, at least, be entirely free of any association with the historical peculiarities of either libel or slander. Most of the proposals discussed below are based upon this initial assumption and apply to all classes of defamation. If the same rules are applied to both libel and slander, defamation by extrinsic fact becomes incorporated into the larger problem of special damages.

There are several alternatives relating to when, if ever, a plaintiff should be required to plead and prove special damages. One proposal is to require proof of special damages in all cases.<sup>104</sup> This approach is undesirable because it rests on a fundamental misconception concerning the basis of the tort. During the medieval period defamation, which was primarily oral at that time, was actionable in both the local courts and the ecclesiastical courts on one of two forms: injury to honor or financial injury. Injury to honor has been retained in the law of libel (and to some extent in Florida's fifth category of slander *per se*). To impose the special damages rule in its modern form would totally remove nonfinancial injuries from the purview of the courts<sup>105</sup> except in those rare instances where the independent tort of mental distress<sup>106</sup> is available.

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100. FLA. STAT. §770.01-02 (1969).

101. FLA. STAT. §770.04 (1969).

102. Donnelly, *Defamation by Radio: A Reconsideration*, 34 IOWA L. REV. 12 (1948).

103. See Donnelly, *The Law of Defamation: Proposals for Reform*, 33 MINN. L. REV. 609, 611 (1949).

104. See Courtney, *Absurdities in the Law of Slander and Libel*, 36 AM. L. REV. 552 (1902).

105. Note, *Libel Per Se and Special Damages*, 13 VAND. L. REV. 730, 732 (1960).

106. *Korbin v. Berlin*, 177 So. 2d 551 (3d D.C.A. Fla. 1965); RESTATEMENT (SECOND) OF TORTS §46 (1966).

At the other extreme, all defamation, oral or written, could be made actionable without proof of damage. This approach, in effect, would restore the old English rule to libel and apply it to slander as well. It would also have the effect of allowing reference to extrinsic evidence to make out defamation under any circumstances. This would eliminate the irrational distinction between libel *per se* and libel *per quod* as it relates to special damages. The proposal has received mixed reactions from textwriters.<sup>107</sup> One writer has suggested that if all slander were made actionable *per se*, the opportunity for trivial but costly litigation would be dramatically increased. The special damages rule, although logically untenable, is supported as a satisfactory means of affording some protection against frivolous and petty lawsuits.<sup>108</sup> Nevertheless, this approach has been implemented successfully in several countries. The Canadian Defamation Act created a new tort, defamation, which includes both libel and slander. Under this Act, which has become law in the provinces of Alberta<sup>109</sup> and Manitoba,<sup>110</sup> all defamatory publications are actionable without proof of special damages.<sup>111</sup> Scotland<sup>112</sup> and Louisiana have also traditionally followed the rule that no requirement of special damages exists with respect to any form of defamation.<sup>113</sup>

Yet another possibility is to retain special damages in the law of defamation by applying the rules of libel *per quod* to all forms of defamatory utterances.<sup>114</sup> This appears to be the Florida position.<sup>115</sup> This approach, however, may be undesirable, since "[t]he law of slander, insofar as it requires proof of special damage, is far too narrow. As Sir Frederick Pollock has said: "[T]he law went wrong from the beginning in making the damage and not the insult the cause of the action."<sup>116</sup> Also, special damages should be concerned with the effect on the plaintiff, but extrinsic fact goes to the preliminary problem of the nature of the defendant's act and whether the law should penalize his conduct in the first place. Therefore, no real connection between the two exists in fact. Originally, an action "per se" such as trespass *quare clausum fregit* was actionable without proof of damage, while "per quod" referred to an action on the case that required proof of damages.<sup>117</sup> The meanings of these categories in the law of defamation

107. Carr, *The English Law of Defamation*, 18 L.Q. REV. 388 (1902); Paton, *Reform and the English Law of Defamation*, 33 ILL. L. REV. 669, 684 (1939); Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33, 54-56 (1904).

108. Donnelly, *supra* note 103, at 610.

109. Alta. c. 14, §§2, 3 (1947).

110. Man. c. 11, §§2, 3 (1946).

111. See Donnelly, *supra* note 103, at 611.

112. Normand, *The Law of Defamation in Scotland*, 6 CAMB. L.J. 327 (1938).

113. *Fellman v. Dreyfous*, 47 La. 907, 17 So. 422 (1895); *Miller v. Holstein*, 16 La. 389 (1840).

114. See Donnelly, *supra* note 103, at 611-12.

115. This approach was taken in the English Press Union Bill, which was introduced in Parliament in 1938 but failed to pass. See Note, 85 L.J. 440 (1938).

116. F. POLLOCK, *TORTS* 243 (12th ed. 1906). Holdsworth, *Defamation in the Sixteenth and Seventeenth Century*, 40 L.Q. REV. 302, 304 (1924).

117. Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733, 736 (1966).

today is uncertain, and it is recommended that the terms be abandoned. If the special damage rule is retained, classication should be made on that basis.

A final proposal is to use the extent of publication as a basis for classification. Defamation that is disseminated through mass media, such as newspaper, television, cinema, or radio, might well be actionable in all cases without proof of special damage because of the greater potentiality of harm. On the other hand, the special damages rule might be retained in circumstances of limited publication such as private letters or conversation.<sup>118</sup> This approach would seem to run counter to the trend of limiting liability for media of mass communication.<sup>119</sup> It does have the virtue, however, of separating defamation-by-extrinsic fact from the special damages rule.

### CONCLUSION

The time has come for a thorough, systematic, and comprehensive reform in the law of defamation. The discussion of Florida cases on the extrinsic-fact problem has demonstrated that no one aspect of the law of libel or slander can be modified without considering its effect on other areas involving defamation. Thus, it would seem that this task is properly within the province of the state legislature.

Since, whether by chance or deliberate judicial policy, the laws of libel and slander have become almost coincident in Florida, the legislature's first consideration should be the advisability of merging libel and slander into the single tort of defamation. The legislature should address itself, among other things, to the question of whether damages should be presumed for any particular species of defamatory statement. It should also consider the propriety of limiting liability for defamatory statements by the communications media either by an extension of qualified privilege or by replacement of the doctrine of liability without fault with a negligence standard. Finally, the legislature should determine whether any distinction should be made between pecuniary and nonpecuniary injuries in the application of the rules of defamation. Hopefully, as a result of such efforts, some logic may be restored to the law of defamation.

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118. Donnelly, *supra* note 103 at 612.

119. See, e.g., Uniform Single Publication Act, FLA. STAT. §§770.05 *et seq.* (1969).